UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ADMINISTRATIVE LAW JUDGE LAUREN ESPOSITO

McDONALD'S USA, LLC, A JOINT EMPLOYER, et al.	**Cases**	**02-CA-093893, et al.** **04-CA-125567, et al.** **13-CA-106490, et al.**
and		**20-CA-132103, et al.** **25-CA-114819, et al.**
FAST FOOD WORKERS COMMITTEE AND SERVICE EMPLOYEES INTERNATIONAL UNION, CTW, CLC, et al.		**31-CA-127447, et al.**

GENERAL COUNSEL'S OPPOSITION TO MOTIONS TO AMEND CASE MANAGEMENT ORDER OR, IN THE ALTERNATIVE, TO CLARIFY OR ESTABLISH NEW PROCEDURES FOR SUBMITTING PROPOSED EXHIBITS FILED BY RESPONDENTS McDONALD'S USA, LLC, MaZT, INC., AND THE NEW YORK FRANCHISEES

Counsel for the General Counsel ("General Counsel") submits this Opposition to the Motion to Amend Case Management Order or, In the Alternative, To Clarify or Establish New Procedures for Submitting Proposed Exhibits (the "McDonald's Motion") filed by Respondent McDonald's USA, LLC's ("McDonald's") and to the Motion for Modification of the Case Management Order, or, In the Alternative, To Clarify or Establish New Procedures for Submitting Proposed Exhibits (the "MaZT Motion") filed by Respondent MaZT, Inc. ("MaZT"), and the New York Franchisees' Motion to Modify/Clarify [the] Case Management Order (collectively, "the Motions to Amend").

At the outset, Counsels for the General Counsel note that they have consistently expressed a willingness to consider various options for dealing with the logistical issues

presented by this complex case, and have consistently worked to improve the physical and logistical arrangements in the case in response to specific concerns raised by the parties.[1] Counsel for the General Counsel welcomes constructive suggestions that comport with the CMO, but the Motions to Amend contain no such discussion. Instead, it is clear that the true purpose of the Motions to Amend is to revisit the consolidation question already decided by the Administrative Law Judge.[2] Even if Respondents' complaints were well-founded, the Motions to Amend fail to show that the purported logistical infirmities constitute an abuse of the General Counsel's discretion in consolidating the cases in this litigation. Thus, while General Counsel remains willing to cooperatively discuss the logistical issues raised by Respondents, this Opposition must respond to serious (though baseless) contentions leveled by the Motions to Amend and explain why the case management procedures require no modification in response to the arguments made by Respondents.

McDonald's makes four main arguments in its Motion, each of which is without merit and does not require any changes to the Case Management Order (the "CMO"). First, in their complaints about the videoconferencing equipment, McDonald's and the New York Franchisees mischaracterize the use and purpose of the videoconferencing arrangements in this case, which are fully adequate to meet the needs of the case. Second, McDonald's' arguments about SharePoint, joined by MaZT and the New York Franchisees, are based on a litany of wholly

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[1] For example, General Counsel has improved the courtroom facilities in response to concerns of the parties by adding additional microphones and an additional video camera, arranging wireless access, and adding electrical outlets in the courtroom.

[2] See McDonald's Motion, footnote 5, suggesting that "the entire theory upon which this proceeding was established needs to be revisited."

incorrect premises, and must be rejected. In particular, the claims that SharePoint is inefficient and unreliable are without merit. To the contrary, the Agency's videoconferencing and SharePoint systems are effective and efficient technical solutions to logistical issues in this case. Finally, MaZT's claims that its rights were violated by discussion in the June 24 hearing and the scheduling of the July 14 hearing are utterly baseless and must be rejected.[3]

A. McDonald's and the New York Franchisees Mischaracterize the Proposed use of the Agency's Videoconference Equipment

McDonald's and the New York Franchisees argue that the CMO should be modified because the Agency's videoconferencing equipment is not suitable to the needs of the case. These arguments are without merit and should be rejected.

1. The Use of Videoconferencing is Unrelated to the Review of Exhibits.

McDonald's and the New York Franchisees complain at length that the Agency's videoconferencing equipment fails to provide remote participants with "the opportunity to review exhibits that are being offered into evidence." (McDonald's Mot. to Amend, p. 7). These complaints are misplaced, because the Agency's videoconferencing equipment is not being used for the exchange and review of exhibits.

Instead, other tools, including SharePoint, will accommodate the need to exchange, review, and offer exhibits into the record. The use of SharePoint is discussed at length in Section B, but in basic terms, the General Counsel proposed the use of SharePoint in response to the CMO's directive that "General Counsel will provide a set of exhibits at the Regional office where counsel will be participating by videoconference." (CMO, p. 5). The ALJ has also

[3] There is no need to independently address the submission filed by the New York Franchisees.

directed the provision of exhibits in paper form to the ALJ, witness, and "whatever other counsel would prefer to use paper copies." (Tr., 210:5-9.) Thus, exhibits will be exchanged either electronically or in paper form, and counsel participating remotely will view the exhibits via electronic form—wholly separate and apart from their view of the hearing itself via videoconference.[4] Likewise, a party participating by videoconference may examine a witness about an exhibit, and offer exhibits into the record, through the use of SharePoint (or mailing, faxing, or emailing of exhibits to the hearing location).

McDonald's next objects to the use of the Agency's videoconferencing equipment based on the premise that meaningful participation requires the ability for counsel to physically point to a document before a witness's eyes. Not only is there simply no merit to this contention, but the record in the case will be far clearer if both remote and in-person counsel verbally identify for the transcript (not to mention for the benefit of the ALJ and others in the room) that portion of an exhibit to which they are directing a witness's attention.

2. The ALJ will view witness testimony in-person, not via videoconference, and the Agency's videoconference equipment is suitable for all necessary functions.

Next, McDonald's suggests that the Agency's videoconference equipment is unsuitable because the ALJ will be unable to make credibility determinations based on witnesses observed via videoconference. This argument mischaracterizes the CMO, which provides that the ALJ will travel to conduct the hearings and observe the witnesses testify in person in those locations.

[4] General Counsel understands that the ALJ's reference to providing paper exhibits to some counsel, upon request, refers only to those counsel participating in person, who would be in a position, along with the ALJ and witness, to receive them. Further, requiring parties to exchange electronic copies of exhibits is now standard practice in some trial proceedings and could reasonably be ordered here.

McDonald's misunderstanding appears to arise from the CMO's requirement that video cameras provide "a close-up view of the witness," but this statement relates only to videoconference participation by "counsel and parties," and makes no mention of the ALJ observing witnesses via videoconference. (CMO, p. 5.) In fact, McDonald's has previously raised this concern in a conference before the ALJ, who clarified, "it's not going to be an issue for me. The witness is always going to be in front of me." (Tr., 100:2-3).

Furthermore, the use of videoconferencing does not prejudice any parties. The CMO provides for a trial schedule designed such that parties with liability risk in each phase of the hearing will be able to participate in person without having to travel an undue distance.[5] Specifically, it provides that the presentation of "evidence regarding the specific violations allegedly committed at the franchisee locations" in New York, Philadelphia, California and the Midwest will take place in three different NLRB Regional offices in order to accommodate the witnesses and counsel from those parts of the country. (CMO, p. 3). The CMO provides that joint-employer evidence may be presented in each phase of the hearing, but this fact does not prejudice any remote counsel: the joint-employer evidence only creates a liability risk for McDonald's, not the Franchisee Respondents, and McDonald's has indicated that it will appear in person at each phase of the hearing. (See Tr., 106:20-107:2 ("JUDGE ESPOSITO: . . .

[5] For this reason, MaZT's claim that a Franchisee Respondent should have substantial advanced notice of the specific *documents* to be offered into evidence on a given day of hearing is nonsensical. As noted, the CMO is designed to permit parties with litigation risk to participate in person during the various phases of the hearing. MaZT's suggestion that a party might decide to travel "3,000 miles" to appear in person based on "an objection or a defense to even a single document" is an absurd hypothetical, when (1) such circumstances will not occur during the phase of trial at which a party bears litigation risk, and (2) in any event, a party may interpose its objections and defenses, and cross-examine witnesses, via the videoconference.

McDonald's is always going to be there. . . . Your attorneys are going to be present throughout the entire case or that was the assumption I made, Mr. Goldsmith. MR. GOLDSMITH: No, that's true. . . . that's absolutely the case.")

As to McDonald's' technical complaints, General Counsel disputes Respondent's characterization of the quality of the videoconference equipment. The image size and quality fully meets the needs of the parties and the litigation.[6]

Finally, McDonald's complains that the court reporter is unable to identify speakers in remote locations who do not verbally identify themselves, and that this somehow calls into the question the use of videoconferencing altogether. In fact, the ALJ has repeatedly directed remote participants to identify themselves for the court reporter, and parties' refusal to follow the Court's directives certainly cannot be a basis for challenging the Court's systems or the CMO.

Accordingly, McDonald's' complaints about the quality and use of the Agency's videoconference equipment are unfounded and do not require any modification of the CMO.

B. The Agency's SharePoint Tool is an Effective and Efficient Means of Exchanging Exhibits

1. Parties Would Not Be Prejudiced by the Need to Upload Exhibits.

Respondents concoct a parade of horribles purportedly resulting from the proposed use of the Agency's SharePoint system. Their conclusions are based on a litany of flawed premises and incorrect assumptions, rendering their arguments entirely meritless.

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[6] As the Court and the parties have been able to observe in previous hearings, when someone in a remote location speaks, the picture of that remote location is automatically enlarged. McDonald's chooses to ignore this feature in its unfounded complaints about the size and layout of the screen. Likewise, the July 14 hearing will enable the parties to observe how the installation of a second camera will further improve the remote parties' view of the ALJ and counsel.

Respondents premise their identical arguments on a misstatement of the General Counsel's position, claiming that General Counsel has "insiste[d] on requiring all parties to upload exhibits onto the Sharepoint [sic] site the night before a hearing or trial day." (McDonald's Motion, p. 10; see also MaZT Motion, p. 10). Aside from the absurdity of suggesting that the General Counsel is in a position to unilaterally make such an imposition, this mischaracterizes the General Counsel's position. The General Counsel takes no position on the timing of uploads to SharePoint, but has proposed the use of this system merely as a tool for exchanging trial exhibits, especially for parties in remote locations to whom paper copies cannot be distributed simultaneous with their use in trial. In fact, General Counsel has identified one of the benefits of SharePoint as its capability to allow the electronic distribution of exhibits simultaneous with the use of such documents in trial (or in "real time," to use McDonald's' term).

The second flaw in Respondents' line of argument is the suggestion that simultaneous distribution via SharePoint would require parties to scan documents during the trial in order to use them at trial. As a technical matter, the proposed use of SharePoint would require that a party *upload* an electronic document, which could already be in electronic form and need not be scanned immediately prior to uploading. As a practical matter, it is no more onerous for counsel to transport to trial electronic documents on their laptops than to bring paper documents in their briefcases. Furthermore, as the ALJ is well-aware from the series of case management conferences concerning production of ESI, the vast majority of responsive documents exchanged in this case are already in electronic form. Thus, Respondents' entire line of argument that the use of SharePoint in the courtroom creates a need for scanners in the courtroom rests on a demonstrably false premise and must be rejected.

While parties may choose to exchange exhibits in advance, a party wishing to avoid "providing . . . a preview of … its trial strategy" to her adversaries[7] can use SharePoint to efficiently exchange exhibits with other parties, including those in remote locations, simultaneous with the party's use of the document in trial. Specifically, parties can maintain on their laptops electronic copies of documents they plan to show to a given witness. Immediately before the examination of that witness—or during the examination itself—the party can upload those electronic documents to SharePoint.

For these reasons, Respondents' arguments that the proposed use of SharePoint prejudices any parties are without merit and should be rejected.

2. The Agency's SharePoint Site is an Efficient and Reliable Tool to Manage Trial Documents in this Complex Litigation.

McDonald's next claims that the SharePoint system is inefficient and unreliable and should not be used. These claims are all without merit.

- **Notice**: SharePoint includes a feature that provides automatic notification to all parties registered for the case when new documents are uploaded to the case file. Counsel for McDonald's did not receive these notifications before June 23 because of technical difficulties that were resolved on June 26.
- **"Monitoring"**: It is unclear what McDonald's refers to when it complains of alleged "monitoring" by the General Counsel, since it does not provide any citations to the purported representations at the June 24 hearing and General Counsel is unable to identify anything in the transcript to which this may

[7] McDonald's Motion, p. 11.

conceivably refer. Agency personnel have "Administrator" access to the SharePoint system, and these administrators can see when users register for access. Activity on the system, including creation of new folders and uploading of new documents, is visible to all users of the SharePoint site. Counsel for the General Counsel is at a loss to understand what prejudice McDonald's suffers here.

- **Efficiency and Time**: Respondents' dire predictions that the use of SharePoint will cause delays in witness examination is based on flawed premises, chiefly resting on the incorrect claim that it is necessary to scan documents prior to showing them to a witness.
- **Wi-Fi in the Courtroom**: Counsel for the General Counsel is not aware of any issues with the Wi-Fi system in the hearing room which would prevent access to the SharePoint system.[8]
- **Personal Laptops**: McDonald's' complaint about the current courtroom is deliberately misleading: while there may be twenty attorneys involved in the matter, most of these are not present in the Region 2 courtroom. The Region 2 courtroom is sufficient, both in space and electrical outlets, to accommodate all

[8] At the June 2 hearing, all counsel who wanted to log onto the "laborguest" wifi with their laptops were successful. Certain counsel had difficulties logging onto the "laborguest" wifi via their mobile devices; Counsel for the General Counsel believes that these problems arose from difficulties in typing the complex password into some mobile devices. Counsel for the General Counsel has suggested ways in which these passwords can be entered more easily. Likewise, counsel for the New York franchisees have reported difficulties accessing their office VPN. Because of the Agency's Headquarters relocation, OCIO has been unable to provide troubleshooting assistance. Counsel for the General Counsel continues to work to address these issues, but notes that difficulties accessing an office VPN should not interfere with using the SharePoint system.

counsel who are physically present in that courtroom. In fact, General Counsel plans to add a third counsel table to provide even more space for counsel and their personal laptops and other materials.

- **Scanner**: As explained above, a scanner is unnecessary to accommodate the needs of parties. Counsel may be reasonably expected to bring to the hearing electronic copies of documents they may need, just as counsel in traditional proceedings are expected to bring paper copies of necessary documents. This is an eminently reasonable expectation in a case in which all documents exchanged by the parties are in electronic form.
- **SharePoint Site Layout**: McDonald's' characterization of the SharePoint site is incorrect. SharePoint includes a feature in which all users with access to the site may create new folders and subfolders. Lead Technology Counsel Rachel See (among other counsel for the General Counsel) has made herself available to discuss any questions or concerns parties may have about SharePoint, and McDonald's has elected to raise unfounded complaints in this adversarial manner rather than asking questions such as this that may have simple answers. She hereby renews her invitation to discuss any questions parties may have regarding the use of SharePoint.
- **"Navigating" Electronic Documents**: It is unclear just what McDonald's' final complaint is. First, it is based on the incorrect premise that the attorney will have a "poor view" of a witness, an unfounded assertion that was addressed in Section A above. Second, it is unclear what alternative McDonald's would propose to the purported "great difficulty" navigating an electronic document on a personal

laptop. Elsewhere, McDonald's complains that there is no centralized projector and screen in the courtroom, and it is difficult to understand how viewing a document on a central screen some distance away would be preferable to viewing it on one's own laptop. This is, at best, a hyperbolic complaint that may be rejected out of hand.

C. MaZT's Arguments Regarding the June 23, June 24, and July 14 Hearings are Meritless

MazT's contention that its due process rights have been violated by the conduct of the June 23 and 24 hearings and scheduling of July 14 hearing are wholly meritless and deliberately misleading.

As the ALJ is well-aware, the only topic discussed at the June 23 and 24 hearings was the status of respondents' subpoena compliance, and all exhibits introduced in those hearing related to this narrow topic. MaZT tellingly omits any description of the purported improperly admitted exhibits, as those exhibits relate to subpoena compliance, which MaZT admits was the topic scheduled that day. (MaZT Motion, p. 8). Specifically, the two documents General Counsel offered into evidence on June 23 (GC-7 and GC-8) consist of correspondence exchanged between counsel for the General Counsel and counsel for McDonald's, and relate solely to McDonald's subpoena compliance. MaZT references to the due process rights of a party to have notice of proceedings based on which it may be found liable for statutory violations are at least inapposite, if not deliberately misleading.

MaZT further complains that General Counsel made a "*de facto* motion" in the hearing on June 24, which was granted by the ALJ. (MaZT Motion, p. 7). MaZT's complaints on this score are a mischaracterization of the proceeding and subsequent events. The suggestion of a

July 14 conference with Franchisee Respondents was a simple accommodation to the fact that the ALJ had already set aside time in her schedule for proceedings in this case on that date. (Tr., 427:25.) Moreover, it was specifically contemplated on the record that some Franchisee Respondents might not be available and the date might have to be revisited. (Tr., 428:24.) However, when General Counsel sent a letter to Franchisee Respondent making arrangements for a July 14 conference, no Franchisee Respondent responded with any objections or scheduling conflicts. Further, General Counsel sent this letter (as MaZT readily admits) on June 25, more than two weeks before the proposed July 14 conference, and no party has objected in the intervening time. It is difficult to understand how an effort to schedule a conference more than two weeks before the proposed date, especially when no party expresses any objection to the proposed date or to the subject of the conference itself, can possibly constitute a due process violation.

For these reasons, MaZT's vague, hyperbolic, and misleading claims of purported "due process" violations reflect no prejudice whatsoever, let alone constitutional violations, and should be easily rejected.

D. Conclusion

For the foregoing reasons, Respondents' Motions should be denied.

Dated: New York, New York
July 13, 2015

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CERTIFICATE OF SERVICE

The undersigned, an attorney for the General Counsel, hereby certifies that she caused a true and correct copy of General Counsel's Opposition to Motions to Amend Case Management Order or, in The Alternative, to Clarify or Establish New Procedures for Submitting Proposed Exhibits Filed by Respondents McDonald's USA, LLC, MaZT, Inc., and the New York Franchisees to be electronically filed with the National Labor Relations Board on July 13, 2015 and served on the same date via electronic mail at the following addresses:

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Dated: July 13, 2015

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